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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

AMERICAN MINING CONGRESS, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

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10 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 5

I. CONFLICTING TESTS FOR DETERMINING WHETHER AGENCIES MUST PROVIDE A SECOND ROUND OF NOTICE AND COMMENT GENERATE WIDESPREAD CONFUSION OVER THE SCOPE OF SECTION 553 OF THE APA 5

A. A Single Test For Determining When An Agency May Promulgate Substantially Different Final Rules Without Providing A Second Round Of Notice And Comment Will Guarantee Meaningful Public Participation And Ensure Consistent Results For The Entire Regulated Community 6

B. The Logical Outgrowth Test Adopted Below Is Unfair And Conflicts With At Least Two Other Tests For Determining Sufficient Notice 7

C. A Single Test Will Eliminate This Erratic Approach To Determining Logical Outgrowth And Avoid Recurring Litigation Every Time An Agency Substantially Changes A Final Rule 11

CONCLUSION 11

TABLE OF AUTHORITIES

CASES Page

AFL-CIO v. *Donovan*, 757 F.2d 330 (D.C. Cir. 1985) 8
BASF Wyandotte Corp. v. *Costle*, 598 F.2d 637 (1st Cir. 1979), *cert. denied sub nom. Eli Lilly & Co.* v. *Costle*, 444 U.S. 1096 (1980) 2, 7
Chamber of Commerce of the United States v. *OSHA*, 636 F.2d 464 (D.C. Cir. 1980) 3, 6
Chocolate Manufacturers Ass'n v. *Block*, 755 F.2d 1098 (4th Cir. 1985) 8
International Harvester Co. v. *Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973) 7
Kennecott v. *United States*, 780 F.2d 445 (4th Cir. 1985) 5, 7
National Black Media Coalition v. *FCC*, No. 479 (2d Cir. May 27, 1986) 10
PPG Industries, Inc. v. *Costle*, 659 F.2d 1239 (D.C. Cir. 1981) 8, 10
Rowell v. *Andrus*, 631 F.2d 699 (10th Cir. 1980) 9
Small Refiners Lead Phase-Down Task Force v. *EPA*, 705 F.2d 506 (D.C. Cir. 1983) 8, 10
South Terminal Corp. v. *EPA*, 504 F.2d 646 (1st Cir. 1974) 9
Taylor Diving & Salvage Co., Inc. v. *U.S. Department of Labor*, 599 F.2d 622 (5th Cir. 1979) 8
United Church Board for World Ministers v. *SEC*, 617 F. Supp. 837 (D.D.C. 1985) 8
United States v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973) 6
United Steelworkers v. *Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Ass'n* v. *Donovan*, 453 U.S. 913 (1981) 8
Wagner Electric Corp. v. *Volpe*, 466 F.2d 1013 (3d Cir. 1972) 8
Weyerhauser Co. v. *Costle*, 590 F.2d 1011 (D.C. Cir. 1980) 9

TABLE OF AUTHORITIES—Continued

STATUTES Page

Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 383, 5 U.S.C. §§ 551 *et seq.* (1982) ..*passim*

5 U.S.C. § 553(b)(3) 5

5 U.S.C. § 553(c) 5

Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1597, 33 U.S.C. §§ 1251 *et seq.* (1982) 4

RULES AND REGULATIONS

48 Fed. Reg. 7046-7047 (Feb. 17, 1983) 4

MISCELLANEOUS

Comment, *The Need for an Additional Notice and Comment Period when Final Rules Differ Substantially from Interim Rules*, 1981 Duke L. J. 377 (1981) 9

K. Davis, *Administrative Law of the Seventies* (1976) 6

Note, *Toward a More Complete Notice of Proposed Rulemaking: A Judicial Overiew* [*sic*] *and Suggestions for Change*, 84 W. Va. L. Rev. 227 (1981) 9

Rochvarg, *Adequacy of Notice of Proposed Rulemaking under the Administrative Procedure Act —When Should a Second Round of Notice and Comment be Provided?*, 31 Am. U. L. Rev. 1 (1981) 9

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST[1]

This case presents the Court with a critical question of administrative law that continues to generate conflicting lower court opinions on when an agency, which substantially changes a final rule from what it originally proposed in the Federal Register, must provide a second round of notice and comment in order to comply with § 553 of the Administrative Procedure Act ("APA"). 5 U.S.C. § 553 (1977). Justices Rehnquist and Powell recognized the importance of this question and the need

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36.1. The parties' consent letters have been filed with the Clerk of this Court.

to resolve it in their dissent to the denial of certiorari in *Eli Lilly & Co.* v. *Costle*, 444 U.S. 1096 (1980).[2] In that case, the lower court held that promulgation of the substantially changed rule did not require additional notice and opportunity to comment because the final rule was the "logical outgrowth" of comments received during the public comment period. *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637 (1st Cir. 1979).

Since then, in partial fulfillment of the dissent's prophecy, several other decisions have added to the confusion in the circuits on when to require a second round of notice and comment prior to adopting a substantially different final rule. At least three different versions of the "logical outgrowth" test have emerged, each focusing on a different source from which the final rule must logically grow.

The logical outgrowth test used by the Fourth Circuit below adopts the *BASF Wyandotte* approach to determining when a second round of notice and comment must be provided. This approach is particularly egregious because it focuses *solely* on whether the final rule was revised in response to *comments* on the proposal, and fails to consider whether the *proposal itself* initially gave interested parties adequate notice of the subjects and issues covered in the final rule. Its application invariably results in decisions like the one below, where the Fourth

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[2] "This case presents an issue of great importance, which cannot help but become greater as time goes on and more and more administrative proceedings are conducted either directly under [§ 553], or similar provisions in new Acts of Congress for review of agency action. . . . That question is the degree to which an agency, which publishes a rule for notice and comment . . . very substantially changes the rule in response to the comments it receives, is obliged to publish the revised rule to allow another opportunity for notice and comment . . . [W]hen we consider the very significant effect that a "rulemaking" procedure may have upon the parties involved . . . , I think this Court should grant certiorari to examine the question." *Id.* at 1097-1098.

Circuit ignored the fact that the agency's choice for the final rule was not even included among the specified alternatives listed in the Federal Register notice.

This version of the logical outgrowth test adversely affects anyone wishing to comment on proposed regulations. Notice and comment rulemaking is one of the key elements of the business community's ability to adapt to an everchanging regulatory environment. By requiring a nexus between only the final regulations and the comments received, this test stands the APA on its head. It shifts the burden of providing notice from the agency to the regulated community, requiring interested persons to determine for themselves the subjects and issues of the rulemaking.

As the nation's largest federation of businesses and business organizations, the Chamber of Commerce of the United States ("Chamber") is particularly disturbed by the Fourth Circuit's approach in this case. The Chamber represents more than 180,000 companies, trade and professional organizations, and state and local chambers of commerce, and often participates on their behalf in rulemakings [3] and in challenges to rulemakings.[4]

The practical implications of the decision below are overwhelming. Unless rejected by this Court, this theory for determining logical outgrowth will force the regu-

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[3] *See e.g.*, Comments of the Chamber of Commerce of the United States on *EEOC Notice of Proposed Rulemaking: Administrative Exemption Allowing for Waivers Under the ADEA, 50 Fed. Reg. 40,870* (Oct. 7, 1985); *Proposed Regulations Relating to the Limitation on the Amount of Depreciation and Investment Tax Credit for Automobiles and the Limitation when Certain Property is Used for Personal Purposes* (Dec. 21, 1984); *Advance Notice of Proposed Rulemaking, 40 C.F.R. 765, Formaldehyde: Determination of Significant Risk* (July 23, 1984).

[4] *See e.g., Chamber of Commerce of the United States* v. *OSHA*, 636 F.2d 464 (D.C. Cir. 1980) (whether OSHA's promulgation of a legislative rule having substantial impact, without giving interested persons advance notice and opportunity for comment, violated § 553 of the APA).

lated community to research voluminous administrative records to obtain "notice" of what the Chamber believes is the statutory duty of the agency to provide.[5] For these reasons, the Chamber urges the Court to grant certiorari in this case, and resolve the conflict in the circuits over the proper use of this test.

STATEMENT OF THE CASE

This case arises out of a lawsuit challenging certain Clean Water Act regulations on the grounds that the Environmental Protection Agency ("EPA" or "Agency") violated the Administrative Procedure Act when it promulgated substantially different regulations from those originally proposed in the Federal Register, without providing additional notice and opportunity for comment.[6] The notice of proposed rulemaking listed six pollution control technologies being considered by the Agency.[7]

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[5] The Federal Register proposal in this case comprised 94 pages out of a 55,000-page administrative record. (Petition for Certiorari at 5). In 1985, the Environmental Protection Agency alone published 1,878 entries in the Federal Register alone, amounting to 5,494 "billable" pages, which is roughly equal to 4,500 full pages of text. (Government Printing Office statistics).

[6] Section 304 of the Clean Water Act, 33 U.S.C. §§ 1251, 1317, requires EPA to set industry-wide water pollution standards, called "effluent guidelines." The effluent guidelines at issue in this case were promulgated for the non-ferrous metal manufacturing industry.

[7] Section VII of the preamble to the proposal, entitled "Available Wastewater Control and Treatment Technology," contained three subheadings: A. Control Technologies Considered; B. Status of In-Place Technology; and C. Control and Treatment Options, which listed the six options ("EPA considered the following treatment and control options . . . for facilities with the nonferrous metal manufacturing category: . . . ."). 48 Fed. Reg. 7046-7047 (Feb. 17, 1983). Section XXIV of the preamble, entitled "Solicitation of Comments," specifically invited the submission of data from facilities "using the treatment technologies *relied upon for this regulation*, and also other equally effective treatment technologies." *Id.* at 7073 (emphasis added).

The final rule, however, imposed a seventh technology selected from EPA's 2200-page Development Document, an encyclopedic compendium of technologies and background material, which was never published in the Federal Register. The Petitioners challenged the final regulations on the issue of adequate notice and opportunity to submit data on the seventh technology. The Fourth Circuit rejected this argument, suggesting that Petitioners should have been aware of the seventh technology because "EPA actually did discuss [it] in the Development Document, which *accompanied* the Proposed Rules . . . ." *Kennecott* v. *United States*, 780 F.2d 445, 452 (4th Cir. 1985) (emphasis added). Endorsing EPA's characterization of the final rule as a " 'natural and logical outgrowth' of the commenting procedure," the Fourth Circuit held that the agency did not violate the APA when it added the new technology "in an attempt to respond to industry comments and complaints." *Id.* at 453.

REASONS FOR GRANTING THE WRIT

I. CONFLICTING TESTS FOR DETERMINING WHETHER AGENCIES MUST PROVIDE A SECOND ROUND OF NOTICE AND COMMENT GENERATE WIDESPREAD CONFUSION OVER THE SCOPE OF SECTION 553 OF THE APA

Section 553 establishes the general statutory framework for informal rulemaking. It requires federal agencies to publish notice of proposed rulemaking in the Federal Register, and to include in the notice "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). After the required notice is published, the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments with or without the opportunity for oral presentation." *Id.* at § 553(c).

Informed public notice and meaningful opportunity to comment on proposed rules are fundamental requirements

of administrative law.[8] Whether and how well an agency meets these requirements depends largely on how the courts interpret § 553. Conflicting judicial interpretations of what the APA requires when an agency publishes a final rule that substantially differs from its proposal raise serious questions about the adequacy of agency rulemaking procedures. The recurring nature of these questions and the breadth of their impact call for immediate resolution by this Court.

A. A Single Test For Determining When An Agency May Promulgate Substantially Different Final Rules Without Providing A Second Round Of Notice And Comment Will Guarantee Meaningful Public Participation And Ensure Consistent Results For The Entire Regulated Community

This Court recognized the very significant effects that a "rulemaking" procedure may have upon interested parties in *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973). The impact of the rulemaking procedure at issue here is equally pervasive. It extends far beyond these EPA regulations and the metal manufacturing industry challenging them, and adversely affects all parties and agencies regulated under § 553 of the APA.

Action by this Court to establish a single test for determining logical outgrowth would allow all courts to take a uniform approach when interpreting the requirements of § 553. Besides giving the regulated community an understanding currently absent from the law, uniformity would ensure that litigation regarding the scope of the logical outgrowth test would not recur each time an agency substantially changes a final rule.

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[8] *See, Chamber of Commerce of the United States*, 636 F.2d at 472 (Bazelon, J., concurring) ("advance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era"). *See generally*, K. Davis, *Administrative Law Of The Seventies*, § 6.01-1 (1976).

B. The Logical Outgrowth Test Adopted Below Is Unfair And Conflicts With At Least Two Other Tests For Determining Sufficient Notice

The logical outgrowth test used by the court below is one of three tests which have emerged from the courts of appeals for determining whether a second round of notice and comment should be required. The fundamental difference between these tests is the way they measure "outgrowth." The Fourth Circuit focuses only on the comments submitted during the comment period.[9] Accordingly, an agency may make substantial changes to its original proposed rule without providing an additional notice and comment period if the changes are a logical outgrowth of the comments received. *Accord, BASF Wyandotte Corp.*, 598 F.2d 637.[10]

Other courts, and even another opinion in the Fourth Circuit, expressly reject the use of comments received to

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[9] The court specifically noted that sulfide precipitation was not listed in the Federal Register proposal: "EPA listed six control and treatment options in the proposed rules; sulfide precipitation was not among them." *Kennecott*, 780 F.2d at 452.

[10] There, the First Circuit warned, "It should be clear to commentators when they criticize a regulatory scheme that if the agency accepts those criticisms a new scheme will be substituted . . . [T]hough EPA's solution was not the one for which the industry argued, it was suggested by and, in part, a logical outgrowth of the industry's comments. They cannot now complain because they misread the regulatory waters [and] incorrectly anticipated how EPA would react to their criticisms." *BASF Wyandotte Corp.*, 598 F.2d at 643. *See* note 2 and accompanying text, *supra*. *See also International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973) ("In part, EPA developed its methodology on the basis of submissions made by the companies at the hearing . . . The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions.").

measure logical outgrowth.[11] They instead focus their examination of the final rule on either the proposed rule as published in the Federal Register,[12] or a combination of the proposal and the comments submitted.[13]

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[11] *See e.g., Small Refiners Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("As a general rule, EPA must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. Thus notice necessarily must come—if at all—from the agency."); *PPG Industries, Inc.* v. *Costle*, 659 F.2d 1239, 1249 (D.C. Cir. 1981) ("While an absence of comments in no way implies inadequate notice, it does alert us to that possibility."); *Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972) ("The absence of comments from such groups may well be because the notice of rulemaking never advised of this subject or issue."). Even a prior Fourth Circuit decision cited by the court rejected this approach. *See Chocolate Manufacturers Ass'n* v. *Block*, 755 F.2d 1098, 1104 (4th Cir. 1985) ("An agency, however, does not have a carte blanche to establish a rule contrary to its original proposal simply because it receives suggestions to alter it during the public comment period.").

[12] *See e.g., AFL-CIO* v. *Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) ("A determination of whether notice was adequate in this case turns, then, on an examination of the notice which the secretary provided in relation to the final rule which was ultimately adopted."); *Taylor Diving & Salvage Co., Inc.* v. *U.S. Department of Labor*, 599 F.2d 622, 626 (5th Cir. 1979) ("It is not necessary, however, for the final form of a regulation to be republished . . . where the proposed regulation, in its initial form, gives sufficient notice to interested parties of the Secretary's intentions . . . Here, . . . the contested provision in the standard finally promulgated was a logical outgrowth of provisions found in the standard originally proposed."). *Accord, United Church Board for World Ministers* v. *SEC*, 617 F. Supp. 837, 840 (D.D.C. 1985) ("Failure to make agency views known at the time of publication of notice circumvents the purpose of the APA notice requirements. Proposed rule changes cannot be "tested" when the public is unaware of both the proposed revision and the theory under which the agency makes its proposal.").

[13] *See e.g., United Steelworkers* v. *Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Ass'n* v.

Of these three approaches,[14] the one adopted by the Fourth Circuit is the most unfair and burdensome to the public. Measuring logical outgrowth from comments received fails to consider whether the proposed rule initially provided adequate notice of the subject and issues covered in the final rule. This approach undermines the rulemaking process, and denies interested parties their right to comment on important aspects of a rule prior to final promulgation. It also turns the APA on its head, using the comment period as a substitute for an agency's failure to satisfy its statutory obligations. Comments submitted during the public comment period should not be confused with notice from the agency. As succinctly put by one court, only an agency can provide notice; "it

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Donovan, 453 U.S. 913 (1981) ("We must proceed to compare carefully the specific language of the proposal with that of the final rule, in light of the evidence adduced at the hearings."); *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 658 (1st Cir. 1974) ("Although the changes were substantial, they were in character with the original scheme and were additionally foreshadowed in the proposals and comments advanced during the rulemaking."). *Accord, Rowell* v. *Andrus*, 631 F.2d 699, 702 n.2 (10th Cir. 1980); *Weyerhauser Co.* v. *Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1980) ("[T]he Agency's final conclusions are far from the 'logical outgrowth' of the preceeding notice and comment process. . . .").

[14] One commentator has identified yet a fourth test: whether the final rule is a logical outgrowth of agency statements published in the notice of proposed rulemaking. *See*, Rochvarg, *Adequacy of Notice of Proposed Rulemaking under the Administrative Procedure Act—When Should a Second Round of Notice and Comment be Provided?*, 31 Am. U. L. Rev. 1, 8 (1981). *But cf.*, Comment, *The Need for an Additional Notice and Comment Period when Final Rules Differ Substantially from Interim Rules*, 1981 Duke L. J. 377 (1981) (does not recognize agency statements in preamble as a separate test). *See also* Note, *Toward a More Complete Notice of Proposed Rulemaking: A Judicial Overiew* [*sic*] *and Suggestions for Change*, 84 W. Va. L. Rev. 227, 246-252 (1981) (the relationship between the "hard look doctrine" and sufficiency of notice); Rochvarg *supra*, at 18-23 (use of the "harmless error approach" as an alternative test for deciding whether to provide additional notice and comment).

cannot bootstrap notice from a comment." *Small Refiners Lead Phase-Down Task Force*, 705 F.2d at 549.

The Fourth Circuit's application of this version of the logical outgrowth test is particularly egregious because no comments were even filed on sulfide precipitation as a possible treatment technology. Instead, the court held that EPA's selection of sulfide was the logical outgrowth of the negative comments received on the six treatment options listed in the notice of proposed rulemaking. Moreover, the court suggested that EPA had further discharged its statutory obligation to provide notice by discussing sulfide precipitation, along with over twenty-five other treatment technologies, in a document not even published in the Federal Register.[15] According to this approach, an interested party could protect its right to participate meaningfully in a rulemaking only by searching the docket for clues of agency intent and commenting on every technology discussed in a Development Document.[16] And such a party would have no way to protect its right to receive meaningful prior notice of the agency's proposal.

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[15] In *PPG Industries, Inc.* v. *Costle*, 659 F.2d 1239 (D.C. Cir. 1981), the court invalidated as "hardly the 'logical outgrowth' of the rulemaking" a final rule developed from methodology cited in a footnote to an unpublished appendix to the proposed rule. The court held that "if a required definition or procedure is part of a rule, it must be published or incorporated by reference in the Federal Register." *Id.* at 1250. *See also, National Black Media Coalition* v. *FCC*, No. 479 (2d Cir. May 27, 1986) (agency reliance on maps and studies not disclosed throughout the proceedings denied parties the opportunity to comment on their methodology or conclusions, and therefore the final rule was not a logical outgrowth of the proposed rule).

[16] Yet, as noted by the court in *Small Refiners Lead Phase-Down Task Force*, 705 F.2d at 550, "[n]othing in the text or legislative history of the [Clean Air Act] hints that Congress intended to require private parties to scrutinize the record for notice of issues that the agency did not raise itself." Nor are there any such hints in the text or legislative history of § 553 of the APA.

C. A Single Test Will Eliminate This Erratic Approach To Applying The Logical Outgrowth Test And Avoid Recurring Litigation Every Time An Agency Substantially Changes A Final Rule

The conflicting versions of the logical outgrowth test outlined above demonstrate an erratic approach to interpreting § 553 of the APA that utterly fails to provide the regulated community and the courts with a workable degree of guidance on when an agency must provide a second round of notice and comment. The Chamber urges this Court to put an end to this continuing conflict by establishing a single logical outgrowth test that complies with the notice and comment provisions of the APA, and ensures meaningful public participation in agency decisionmaking.

The test adopted by the court below imposes unreasonable burdens on interested parties and severely restricts their rights under the statute. The Chamber urges the Court to reject this approach and instead to adopt a test which measures logical outgrowth only from the proposed rule as published in the Federal Register. Such a test would respond to the regulated community's need for guidance and reduce the multiplicity of litigation that continues to occur every time an agency promulgates a substantially different final rule.

CONCLUSION

For these reasons stated above, this Court should grant the petition for certiorari.

Respectfully submitted,

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